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In re: **New NCE-FM, Bishop, CA**
Facility ID No. 175321
File No. BNPED-20071016AJF

Petition for Reconsideration

Dear Counsel:

This letter concerns the referenced application ("Application") of Nevada-Utah Conference of Seventh Day Adventists ("Nevada-Utah") for a new noncommercial educational ("NCE") FM station at Bishop, California. On May 27, 2010, Benett Kessler ("Kessler")¹ filed a Petition for Reconsideration (the "Petition")² seeking reconsideration of the dismissal of an earlier Petition for Reconsideration ("2008 Petition") that she had filed on September 12, 2008. For the reasons set forth below, we grant the Petition, rescind our grant of the Application and dismiss the Application pursuant to Section 73.3566(a) of the Commission's Rules ("Rules").³ We also grant a Motion for Leave to Submit Declaration of Brian Law ("Motion") filed by Kessler on June 1, 2011.

Background. In a decision released on June 30, 2008, we awarded Nevada-Utah a dispositive preference under Section 307(b) of the Communications Act of 1934, as amended,⁴ and designated Nevada-Utah the tentative selectee for NCE MX Group 23.⁵ We also accepted the Application for filing

¹ Kessler is licensee of KSRW(FM), Independence, California.

² Nevada-Utah opposed ("Opposition") the Petition on June 9, 2010, to which Kessler replied ("Reply") on June 17, 2010.

³ 47 C.F.R. § 73.3566(a).

⁴ 47 U.S.C. § 307(b).

⁵ See *Threshold Fair Distribution Analysis of 32 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 23 FCC Rcd 10213, 10216 (MB 2008). No other application remains pending from NCE MX Group 23.

and established a 30-day period for filing petitions to deny.⁶ No petitions or objections were filed. Accordingly, on August 11, 2008, we granted the Application.⁷

Subsequently, Kessler timely filed the 2008 Petition.⁸ Kessler argued that Nevada-Utah did not have reasonable assurance of site availability when it filed the Application. On April 27, 2010, we dismissed the 2008 Petition, finding it procedurally defective.⁹ Specifically, we found the 2008 Petition failed to comply with the requirements of Section 1.106(b)(1) of the Rules¹⁰ because Kessler did not object to the Application prior to its grant nor did she show good cause why it was not possible for her to participate earlier.¹¹ We also noted that, had we reached the merits, we would not have overturned our grant of the Application. Among other things, we stated that “Kessler’s failure to provide a timely affidavit from the tower owner or its representative made under penalty of perjury, and her reliance instead on her uncorroborated hearsay account of her conversation with [the tower owner’s representative]” were fatal to Kessler’s claim regarding the availability of the site specified by Nevada-Utah in the Application.¹²

Kessler timely challenged the dismissal of the 2008 Petition. Kessler argues that we erred in finding the 2008 Petition to be procedurally defective.¹³ Kessler also contests our finding that she failed to make a *prima facie* case that Nevada-Utah lacked reasonable assurance of site availability and submits a declaration (“McClenaghan Declaration”) from Daniel McClenaghan (“McClenaghan”), President of Living Proof, Inc. (“Living Proof”), the owner of the tower specified in the Application, as further support for her allegation.¹⁴

In opposition, Nevada-Utah argues that the 2008 Petition was procedurally defective and that the Petition is repetitious and should be dismissed. Nevada-Utah, however, did not respond to Kessler’s allegation regarding the availability of the site specified in the Application. Accordingly, on March 14, 2011, we sent a Letter of Inquiry (“LOI”) to Nevada-Utah requesting that it respond to this allegation. After requesting and receiving additional time to respond, on April 8, 2011, Nevada-Utah submitted a response (“LOI Response”) to the LOI, which included a declaration (“Ashcraft Declaration”) from its consulting engineer, Leo Ashcraft (“Ashcraft”).¹⁵

Subsequently, Kessler sought leave to submit a declaration (“Law Declaration”) from Brian Law (“Law”), an employee of Living Proof who is referenced in the LOI Response and the Ashcraft

⁶ *Id.* at 10225.

⁷ Public Notice of the grant was released on August 14, 2008. *See Broadcast Actions*, Public Notice, Report No. 46800 (rel. Aug. 14, 2008).

⁸ Nevada-Utah opposed the 2008 Petition on October 16, 2008, to which Kessler replied on October 22, 2008.

⁹ *Mark Van Burgh* [sic], *Esq.*, Letter, 25 FCC Rcd 4474, 4475-76 (MB 2010) (“*Letter*”).

¹⁰ 47 C.F.R. § 1.106(b)(1).

¹¹ *Letter* at 4475-76.

¹² *Id.* at 4477-78.

¹³ Petition at 2-5.

¹⁴ *Id.* at 6-9 and Attach. 1, McClenaghan Decl.

¹⁵ LOI Response, Ashcraft Decl.

Declaration. Kessler asserts that “it is appropriate that the Bureau have the benefit of Mr. Law’s perspective on the issue of whether he could or would have authorized another party to use Living Proof’s tower.”¹⁶

Discussion. Procedural Issues. Kessler argues that we erred in finding her 2008 Petition to be procedurally defective. She cites Section 1.106(c)(2) of the Rules in support of her argument, characterizing it as “the second and alternate prong” under which we could have accepted her 2008 Petition.¹⁷ Nevada-Utah disputes Kessler’s interpretation of Section 1.106. Nevada-Utah asserts that, while Section 1.106(c)(2) does permit the Commission to grant a petition for reconsideration that presents new facts if it finds it is in the public interest to do so, Kessler herself cannot present these new facts to the Commission because she has not met the separate and distinct requirements of Section 1.106(b),¹⁸ which govern who can file such a petition.¹⁹ We agree. Indeed, the Commission has clarified this before, stating:

Section 1.106(c) does not relate to who may file a petition for reconsideration; that is the subject of Section 1.106(b)(1). Rather, Section 1.106(c) addresses the circumstances under which an otherwise proper petition for reconsideration may rely on facts not previously presented. That Section 1.106(c)(2) permits such facts to be raised when “consideration of the facts relied on is required in the public interest” does not in any way affect or provide relief from the requirement in Section 1.106(b)(1) that a person seeking reconsideration of Commission action must either already be a party to the proceeding or explain why earlier participation was not possible.”²⁰

We affirm our earlier finding that the 2008 Petition was procedurally defective. However, due to the nature of the issue involved in this proceeding,²¹ we find that consideration of the additional evidence submitted by Kessler in support of her allegation regarding site availability is in the public interest.²² Thus, we grant the Petition to the extent noted herein.

¹⁶ Motion at 2.

¹⁷ Section 1.106(c)(2) permits the grant of a petition for reconsideration which relies on facts not previously presented if the Commission determines that “consideration of the facts relied on is required in the public interest.” 47 C.F.R. § 1.106(c)(2).

¹⁸ 47 C.F.R. § 1.106(b).

¹⁹ Opposition at 4.

²⁰ *Regionet Wireless License, LLC*, Memorandum Opinion and Order, 17 FCC Rcd 21269, 21272 (2002). *See also Telecinco, Inc.*, Letter, 22 FCC Rcd 21526, 21527 (MB 2007) (“Section 1.106(b)(1) [sic] is an absolute requirement for non-parties, and is wholly separate from Section 1.106(c)(2).”).

²¹ It is well established that to be basically qualified an applicant must have, among other things, reasonable assurance of the availability of the transmitter site it proposes to use. Lack of such reasonable assurance is a basis for dismissal of the application pursuant to Section 73.3566(a) of the Rules. *See, e.g., Liberty Productions, L.P.*, 16 FCC Rcd 12061, 12084 (2001).

²² *See, e.g., Colorado Materials Holding Corp.*, Order on Reconsideration, 22 FCC Rcd 13997, 13998 (WTB 2007) (affirming denial of earlier petition for reconsideration based on information before Bureau at that time but granting petition for further reconsideration based on new information submitted by petitioner). *See also, Morton Jerome Victorson, Bankruptcy Trustee*, Memorandum Opinion and Order, 10 FCC Rcd 9499, 9500 (1995) (affirming staff’s finding that petition for reconsideration was procedurally defective but, on Commission’s own motion, electing to consider the substantive arguments made); *Preston Trucking Co., Inc.*, Memorandum Opinion and Order, Notice of (continued . . .)

In addition, while we generally do not offer third parties the opportunity to respond to claims made by an applicant or licensee in response to an LOI, we find the unique circumstances of this case warrant doing so here. The Ashcraft Declaration that accompanied the LOI Response asserts that Ashcraft obtained reasonable assurance of site availability from Law. Given that Kessler seeks leave to submit a declaration from Law that responds to Ashcraft's assertion, we find that it is appropriate for us to grant the unopposed Motion and consider the Law Declaration in our analysis.

Substantive Issues. In her Petition, Kessler continues to assert that Nevada-Utah lacked reasonable assurance of site availability. She submits the McClenaghan Declaration as further support for this allegation. McClenaghan states: "To my knowledge, [Nevada-Utah] never contacted Living Proof regarding the possible use of the tower for their proposed new FM station, and Living Proof never gave its consent for [Nevada-Utah] to use this tower or propose to use this tower in the [Application]."²³ While Nevada-Utah did not address the site availability allegation in its Opposition (or when it opposed the 2008 Petition), after being directed to respond to the allegation by staff, Nevada-Utah submitted the Ashcraft Declaration. Therein, Ashcraft states "I have no written records of my work on this application."²⁴ Thus, he indicates that his declaration is "based on my memory and my review of the application."²⁵ Ashcraft states that he contacted the person listed as the contact person for the Living Proof tower – a man whose first name was Brian.²⁶ He states that "[i]t was my understanding from Brian that he gave me reasonable assurance of the availability of this tower for my client's antenna site in this application." In response to the LOI Response and the Ashcraft Declaration, Kessler submitted the Law Declaration. Therein, Law denies ever having given Ashcraft "permission for anyone to use Living Proof's tower."²⁷ Law explains that he lacked the authority to do so.²⁸ He notes that "[p]ermission to use

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Inquiry, and Notice of Proposed Rulemaking, 31 FCC 2d 366, 368 (1971) (finding petitions for reconsideration procedurally defective but considering merits of petitioners' major arguments because "there are circumstances present which justify" such action). We reject Nevada-Utah's attempt to analogize this case to *Lee G. Petro., Esq.*, Letter, 25 FCC Rcd 4486 (MB 2010) ("*Petro*"). *Petro* involved allegations that the applicant lacked reasonable assurance of site availability that were raised for the first time in a reply pleading. *Id.* at 4487-88. We refused to consider these arguments due to the rule limiting replies to "matters raised in the oppositions," *id.* at 4488, which is intended to "allow the target of a petition to deny the opportunity to respond to all allegations against it." See 47 C.F.R. § 1.45(c). See also *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.*, Order, 25 FCC Rcd 7521, 7524 (MB 2010). Neither that rule nor the policy underlying it are implicated here.

²³ Petition, Attach. 1, McClenaghan Declaration at ¶ 3. He goes on to state: "Indeed, if Living Proof had been contacted by [Nevada-Utah] regarding the use of our tower, I would have told them they could not use the tower because of our concern that the operation of a full-power FM station from such a short tower in the middle of Bishop would cause significant blanketing interference problems to people living near the tower, including hindering or preventing the reception of Living Proof's station ...". *Id.*

²⁴ LOI Response, Ashcraft Decl. at ¶ 4.

²⁵ *Id.*

²⁶ *Id.* at ¶ 5. Nevada-Utah points out that the contact for this tower in the Commission's Antenna Structure Registration database is Law. LOI Response at 2. While Nevada-Utah implies in the LOI Response that Law is the person with whom Ashcraft allegedly spoke, we note that Nevada-Utah did not attempt to contact Law to determine whether he actually was the person with whom Ashcraft spoke or to obtain corroboration of Ashcraft's version of events. We also note that, when Law was contacted by Kessler, he specifically denied providing reasonable assurance to Ashcraft. Motion, Law Decl. at ¶ 3.

²⁷ Motion, Law Decl. at ¶ 3.

the Living Proof tower would have to come from Living Proof's president, Mr. Daniel McClenaghan, or Living Proof's full Board of Directors."²⁹ Finally, Law explains that, "because of the relatively short height of the tower, and its location on the roof of a building where people work (including myself), a full power FM station operating from this tower is inappropriate due to possible human exposure to RF radiation and interference it likely would cause to people living near the tower" and notes that this is "why I would not have given permission to use the tower, even if I had such authority."³⁰

An applicant seeking a new broadcast facility must, in good faith, possess "reasonable assurance" of a transmitter site at the time it files its application.³¹ It is well established that the specification of a transmitter site in an application is an implied representation that the applicant has obtained reasonable assurance that the site will be available.³² While some latitude is afforded such "reasonable assurance," there must be, at a minimum, a "meeting of the minds resulting in some firm understanding as to the site's availability."³³ A mere possibility that the site will be available is not sufficient.³⁴

We find that, with the submission of the McClenaghan and Law Declarations, Kessler has made a *prima facie* case that Nevada-Utah lacked reasonable assurance of the availability of the site proposed in the Application, which Nevada-Utah has failed to rebut. We find the Ashcraft Declaration unpersuasive. Ashcraft is unable to fully identify the person from whom he allegedly obtained permission for Nevada-Utah to use the Living Proof tower. Moreover, if the individual Ashcraft contacted was Brian Law, the Law Declaration specifically rebuts Ashcraft's claim that he obtained reasonable assurance. In addition, we note that Ashcraft provides no documentation to support his claim that he contacted Law or his claim

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²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ See, e.g., *Port Huron Family Radio, Inc.*, Decision, 66 RR 2d 545 (1989); *Radio Delaware, Inc.*, Memorandum Opinion and Order, 67 RR 2d 358 (1989).

³² See, e.g., *William F. Wallace and Anne K. Wallace*, Memorandum Opinion and Order, 49 FCC 2d 1424, 1427 (1974) ("*Wallace*") ("Some indication by the property owner that he is favorably disposed toward making an arrangement is necessary").

³³ *Genesee Communications, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 3595 (1988). The applicant need not own the proposed site and may even work out the final details for a lease sometime in the future. The "reasonable assurance" standard is satisfied by "[s]ome clear indication from the landowner that he is amenable to entering into a future arrangement with the applicant for use of the property as its transmitter site, on terms to be negotiated . . .". *Elijah Broadcasting Corp.*, Memorandum Opinion and Order, 5 FCC Rcd 5350, 5351 (1990).

³⁴ See *Wallace*, 49 FCC 2d at 1425. The Commission does not require (and has never required) NCE broadcast applicants to certify the availability of the transmitter site in its application procedures. See, e.g., *Carnegie-Mellon Student Government Corp.*, Hearing Designation Order, 7 FCC Rcd 3914 (MB 1992). Nonetheless, when an NCE applicant proposes a site, it must do so with reasonable assurance in good faith that the site will be available. See, e.g., *Midland Educational Broadcasting Foundation*, Hearing Designation Order, 4 FCC Rcd 5207 (MB 1989) (holding that applicant for an NCE FM station had reasonable assurance of site availability because it paid for a lease option on transmitter site). Cf. *Alabama Citizens for Responsive Public Television, Inc.*, Memorandum Opinion and Order, 62 FCC 2d 755 (Rev. Bd. 1977) (NCE television broadcast application designated for hearing on issue of whether applicant had reasonable assurance of the site proposed in its application).

that Law authorized Nevada-Utah to use the Living Proof tower.³⁵ Finally, we note that, as Nevada-Utah's engineering consultant, Ashcraft is not a disinterested party.³⁶ While the "reasonable assurance" standard is a liberal one, Nevada-Utah has failed to meet it. Accordingly, Nevada-Utah may not amend to cure this fatal defect, as it proposes in the LOI Response.³⁷ Thus, we will rescind our grant of the Application and dismiss it pursuant to Section 73.3566(a) of the Rules.

Conclusion/Actions. For the reasons set forth above, IT IS ORDERED that the Motion for Leave to Submit Declaration of Brian Law filed by Benett Kessler on June 1, 2011 IS GRANTED. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by Benett Kessler on May 27, 2010, IS GRANTED to the extent discussed above. IT IS FURTHER ORDERED that grant of the application for a new noncommercial educational FM station at Bishop, California (File No. BNPED-20071016AJF) filed by Nevada-Utah Conference of Seventh Day Adventists IS RESCINDED and the application IS DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Benett Kessler
Nevada-Utah Conference of Seventh Day Adventists

³⁵ Moreover, we find troubling the fact that Nevada-Utah failed to provide any evidence to rebut Kessler's allegation until specifically instructed to do so by the Bureau. Indeed, Nevada-Utah requested extensions of time to respond to the LOI and then submitted what falls far short of persuasive evidence rebutting Kessler's allegation or the statements made in the McClenaghan Declaration.

³⁶ See, e.g., *Iglesia Jesucristo Es Mi Refugio, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability, 25 FCC Rcd 16310, 16319 (MB 2010).

³⁷ LOI Response at 3.